IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 366-367.

No. 366.

BAY RIDGE OPERATING CO., INC., *Petitioner*,

v.

JAMES AARON, ET AL., *Respondents*.

No. 367.

HURON STEVEDORING CORP., *Petitioner*,

v.

LEO BLUE, ET AL., *Respondents*.

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA.

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MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as Counsel for the National Association of Manufacturers of the United States of America,

respectfully move this Honorable Court for leave to file the annexed brief *amicus curiae* in these cases.

1. The National Association of Manufacturers is a non-profit membership corporation incorporated under the laws of the State of New York.

2. The membership of the Association consists of over 16,500 member companies engaged in manufacturing throughout the United States.

3. A large proportion of the Association's membership operates under union contracts collectively bargained with representatives of their employees.

4. Since most collective bargaining agreements contain some provisions for overtime payments for time worked outside the normal work schedule, the decision in this case will have a direct and important bearing on these agreements.

5. On or about December 17, 1947, Counsel for the Association wrote to the attorneys of record for the parties in these cases requesting consent to file a brief *amicus* in connection with this cause.

6. The Department of Justice by letter dated December 24, 1947, granted consent to the filing of a brief by the Association as *amicus curiae*.

7. The respondents, by their attorneys, Goldwater and Flynn, declined consent as follows on December 22, 1947:

> "Yours is the fourth such request. We have declined consent in all cases, and do so likewise in yours, to avoid confusion of the issue before the Court with other matters not germane."

8. On December 27, 1947, typewritten copies of the Association's proposed brief were sent to the attorneys for the

parties and on December 31, 1947, the final brief was so mailed. The final brief differed from the typewritten copies previously sent only in minor respects.

9. Basically these cases involve the question of whether or not overtime paid for at time and one-half under a collectively bargained contract for time worked before or after established "normal" work periods is overtime which may be offset against that payable under the Fair Labor Standards Act. In other words, are such contract overtime payments merely compensation for straight time which must be included in the "regular rate" of pay for purposes of computing overtime as required by the Fair Labor Standards Act?

Obviously, any decision reached will have an important bearing on the collective agreements and industrial relations of numerous members of the National Association of Manufacturers.

The potential retroactive liability can hardly be estimated for industry as a whole at the present time. Some indication of its magnitude can be gained, however, from the amounts involved in the stevedoring industry alone as developed in the record of these cases.

The impact of a decision upholding the Circuit Court upon industry generally is discussed in the attached *amicus* brief. It is our earnest belief that this brief will be of assistance to the Court in that it seeks to develop certain aspects of the problem not treated in detail in the briefs of the parties directly affected.

10. Although by reason of the foregoing circumstances, consent of all parties to the litigation has not been obtained as provided in Rule 27, subd. 9, of the Rules of this Court, it is respectfully submitted that the case affords an appropriate occasion for the exercise of this Court's discretion and undoubted power to receive the Association's *amicus* brief annexed hereto.

We, therefore, respectfully urge that the Court grant leave to file the annexed brief which is made a part of this motion, on behalf of the National Association of Manufacturers as *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE.

JURISDICTION; STATUTE INVOLVED, AND FACTS.

The Court's attention is respectfully invited to the Government's brief in which the above are set forth in detail.

QUESTION.

The basic issue presented in these cases is whether contract overtime payments are "regular rate" payments under the Fair Labor Standards Act.[1] Stated differently, the

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[1] Act of June 25, 1938; 52 Stat. 1060, 29 U. S. C. 201, *et seq.*

issue is whether an employee who regularly works some overtime thereby creates a situation where the overtime becomes a part of *his* normal workday or workweek and therefore converts the overtime rate into a *regular* straight-time rate upon which overtime compensation must again be paid.

LOWER COURT DECISIONS.

The District Court[2] concluded that overtime paid under the contracts involved here could be credited against statutory overtime and that the character of overtime was unaffected by the regularity of an employee's work during overtime periods.

The Court below[3] reversed that decision for reasons which are by no means clear. Apparently, however, the Court below based its decision on the following propositions of law:

(1) That all time *customarily* spent by an employee at work must be considered to fall within his regular workday or workweek and treated as "regular rate" time even though some or all of the time worked was compensated for at contract overtime rates;

(2) That the statutory "regular rate" of pay for an employee regularly working some contract overtime must be determined by dividing hours of work into compensation payable under the contract. (If all hours worked in a given week were during overtime hours, the contract overtime rate would be the statutory "regular rate".)

(3) That the *Belo* case doctrine[4] does not sanction the fixing of regular and overtime rates in the absence of a

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[2] Addison, et al. v. Huron Stevedoring Corp.; Aaron et al. v. Bay Ridge Operating Company (1947, S. D. N. Y.), 69 F. Supp. 956.

[3] Aaron et al. v. Bay Ridge Operating Company; Blue et al. v. Huron Stevedoring Corp. (C. C. A. 2, 1947), 162 F. (2d) 665.

[4] Walling v. A. H. Belo Corporation (1942), 316 U. S. 624, 86 L. ed. 1716, 62 S. Ct. 1223.

guaranteed minimum weekly wage. (A contract fixing of a "regular rate" which may be less than the average rate in certain weeks is not permitted by the Act unless the contract also guarantees a weekly minimum wage).

IMPLICATIONS OF DECISION TO INDUSTRY GENERALLY.

If, as the Court below concluded, *true overtime* becomes regular time when customarily worked, many employers have unknowingly violated the law and have accrued huge retroactive liabilities. This novel principle of law could bring about litigation on a scale which might well exceed that which followed the decision of this Court in *Anderson v. Mt. Clemens Pottery Co.,* (1946) 328 U. S. 680, 90 L. ed. 1515, 66 S. Ct. 1187. It would nullify a large number of existing collective agreements, seriously disrupt the practice and procedures of collective bargaining, and give rise to needless labor disputes.

The type of agreement involved in these cases is not limited to the stevedoring industry. Nor is this type of agreement the only type which would be jeopardized if the decision below should be affirmed. Overtime provisions of collective bargaining agreements vary widely as indicated by a recent study of the United States Department of Labor.[5]

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[5] Study of Bureau of Labor Statistics entitled "Premium Pay Provisions in Selected Union Agreements", Monthly Labor Review, October 1947, Vol. 65 No. 4, pp. 419-425.

> "Most union agreements in effect in the second half of 1946—85 percent of those studied—provided overtime pay at the rate of time and a half for all work in excess of 8 hours a day or 40 hours a week . . .
>
> "Almost half the agreements . . . had provisions requiring penalty rates for work performed on Saturday as such; and about 60 percent covering a similar proportion of workers, required penalty rates for Sunday work as such . . . more than 80 percent of the workers who received premium pay for Saturday or Sunday as such were paid time and half for Saturday work and double time for Sunday work . . .
>
> "More than four-fifths of all workers in the sample received premium pay for . . . work on holidays". (Monthly Labor Review, October 1947, p. 419.)

There are outlined below three types of overtime provision found in an overwhelming majority of existing collective bargaining agreements.

Work schedules and work patterns of employees differ between individuals, plants and industries. Schedules even for a majority of workers in a given plant or other place of employment vary with demands for the products or services of the business. It is not at all unusual in industry for plants to be operated around-the-clock, and for at least some employees to work regularly 48 hours each week or to work regularly on weekends and holidays. In fact there are many industries in which continuous round-the-clock operations are essential and in which overtime is of necessity scheduled with some regularity. Also, during the period from February 9, 1943, until August 30, 1945, most employees worked at least 48 hours per week in conformity with Executive Order 9301, "Establishing a Minimum Wartime Workweek of Forty-Eight Hours".[6]

(1) Daily Overtime Paid Under Agreement.

An overtime clause found by the Department of Labor study to be in 85% of collective agreements requires the payment of overtime at time and one-half an employee's basic or regular rate for time worked in excess of 8 hours daily or forty hours weekly, whichever is greater.[7] (These provisions were generally designed to conform to the overtime requirements of the Walsh-Healey Public Contracts Act[8] as interpreted by the Administrator and the Fair Labor Standards Act).

If an employee works on a schedule calling for daily shifts longer than 8 hours, it is the usual practice in industry to compute his overtime on a daily basis. The reason for this procedure may be simply stated. If an em-

[6] Executive Order 9301, February 9, 1943, 8 F. R. 1825, Revoked by Executive Order 9607, August 30, 1945, 10 F. R. 11191.

[7] Footnote 5, *supra*.

[8] Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. 35-45.

ployee works on a schedule calling for 5 days of 10 hours each, he would be entitled under an 8 and 40 hour contract to 8 hours of overtime compensation if he worked only 4 days in a week. If he worked all of the scheduled hours, he would be entitled to 10 hours of daily overtime or 10 hours of weekly overtime, and payment of overtime on a daily basis would satisfy the requirements of the contract.

The serious implications of the rule of law enunciated by the Court below may be illustrated by applying it to an employee working on a schedule of 10 hours daily and 50 hours weekly and who has been paid in conformity with an 8 and 40 hour collective agreement.

If the regular or basic rate of the employee is $1.00 per hour, he would have been paid for his normal week of 50 hours the sum of $55—40 hours at $1.00 and 10 hours at $1.50.

Under the rule of the Court below, the $55 paid under the contract would presumably be treated as straight-time compensation. If so, the "regular rate" for purposes of the Fair Labor Standards Act would have to be computed by dividing 50 hours into $55. The resultant fictitious "regular rate" is $1.10. Accordingly, the employee would be entitled to be paid $60.50 under the Act for the workweek instead of $55 paid under the contract. This figure, when considered in conjunction with the double penalty provisions of section 16(b) of the Act, should point up the serious potential liabilities here involved.[9]

(2) Weekly Overtime Paid Under Agreement.

If an employee has normally worked on a 48-hour weekly schedule, consisting of six 8-hour days, the result would be comparable. If his straight-time rate was $1.00 per hour, he would have been paid under a typical collective agreement $52—40 hours at $1.00 and 8 hours at $1.50.

Applying the decision of the Court below, his "regular rate" for purposes of the Act would appear to be $1.08

[9] 29 U. S. C. 216(b), 52 Stat. 1069.

per hour. Thus, he should have been paid $56.16 for each full week instead of $52.00.

(3) Overtime Paid for Saturdays, Sundays and Holidays.

If an employee has a normal workweek of six 8-hour days, including Saturdays and specified holidays for which time and one-half is payable under the usual collective agreement, and Sundays, for which double time is payable, his regular rate, again applying the decision below, would presumably be determined by dividing 48 into his straight-time and overtime payments due under the Contract. An employee whose contract rate was $1.00 an hour would have a new regular rate of $1.33 during a week having one holiday, and a regular rate of $1.25 during a non-holiday week.

On the basis of these three examples alone, it is respectfully submitted that the District Court did not overstate the probable impact of the rule of law sought to be established by the respondents herein when it said

> ". . . it is clear that the application of . . . plaintiffs' formulae to the Nation's wage bill retrospectively would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry.
>
> "Such catastrophic results are inevitable once we accept plaintiffs' underlying premise—that in determining the 'regular rate' intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise, genuine collective bargaining cannot exist."[10]

It is respectfully submitted that the decision of the Court below is not required by the Fair Labor Standards Act, nor by decisions of this Court. Moreover, it is contrary to the intent of Congress as most recently expressed in the Labor-

[10] 60 F. Supp. 956.

Management Relations Act, 1947[11] and the Portal-to-Portal Act of 1947.[12]

ANALYSIS OF DECISION BELOW.

~~The *primary* ruling of the Court below was that work de-~~ fined by contract as "overtime" must be treated as "regular" time when customarily or normally worked.

A careful review of the Circuit Court's decision indicates that its ruling was based on one general interpretation by the Administrator of the Act, a more specific interpretation by an Assistant Solicitor of the Department of Labor, and upon certain decisions of this Court, which the Court below believed controlling.

The administrative interpretations relied upon suggest that overtime compensation paid for hours *not normally* worked may be credited against statutory overtime, but that overtime compensation paid for hours *normally* worked may not be so credited. It is submitted that other administrative interpretations not cited by the Court below support the conclusion that any true premium overtime compensation may be properly credited against statutory overtime.[13]

It is not our purpose here to dwell at length on the administrative interpretations treating the subject of crediting overtime payments against statutory overtime. We are convinced that the Court below attached an importance to the phrase *"hours worked outside the normal or regular working hours"* not warranted by the context of the entire interpretative bulletin or by administrative enforcement policies. We have been unable to find any case in which the Administrator has initiated formal proceedings to establish that contracts of the type involved herein or that other types of agreements of the character described above violate the Act when overtime work is regularly scheduled.

If the Administrator gave to this language the same broad effect as was given by the Court below, it seems likely that

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[11] Public Law 101, 80th Cong. 1st Sess.

[12] Public Law 49, 80th Cong. 1st Sess.

[13] Interpretative Bulletin No. 4, paragraphs 70(1), 70(2), 70(3), and 70(5), 1944 WH Man. 168-169.

the administrative interpretations would have incorporated standards or criteria for determining when and under what conditions time worked is either inside or "*outside the normal or regular working hours.*"

But neither the administrative interpretations nor the decision of the Court below contain any guides for determining what are "*normal or regular working hours.*"

For example, are the "normal" hours of an employee to be determined from his individual work schedule or by the schedule prevailing in his place of employment or generally in the community or industry? Again, how frequently could an individual work during overtime periods before such overtime would be considered as part of his "normal" hours?

The *second* proposition of law advanced by the Court below, is that an averaging theory must be followed in all cases concerned with the meaning of the term "regular rate" unless the factual situations are substantially the same as those existing in *Walling* v. *A. H. Belo Corp.* (1942), 316 U. S. 624, 86 L. ed. 1716, 62 S. Ct. 1223, and *Walling* v. *Halliburton Oil Well Cementing Co.* (1947), 331 U. S. 17.

We believe the Court below erred in this conclusion by misconstruing the scope and application of the various "regular rate" decisions of this Court.

This Court first enunciated the "averaging" doctrine in the case of *Overnight Motor Transportation Co.* v. *Missel* (1942), 316 U. S. 572, 86 L. ed. 1682, 62 S. Ct. 1216.

This case presented two problems. (1) Whether or not the Act compelled the payment of additional compensation for overtime to a weekly rate employee whose salary exceeded the statutory minimum for hours worked up to 40 each week and time and one-half that minimum for hours worked in excess of 40; and (2) what constituted the employee's "regular rate."

Concerning the first, this Court said:

> "We conclude that the Act was designed to require payment for overtime at time and a half the regular

pay, where the pay is above the minimum, as well as where the regular pay is at the minimum.'"[14]

The "regular rate" of the employee was directed to be determined as follows:

"Wage divided by hours equals regular rate. Time and a half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours."[15]

No other questions were involved in this case. It cannot be properly concluded, therefore, that the *Missel* decision compels the Circuit Court ruling.

The decision of this Court in *Walling* v. *Helmerich & Payne*, (1944), 323 U. S. 37, 89 L. ed. 1, 65 S. Ct. 11, was also cited by the Court below as supporting its conclusion. In this case the *Missel* or "averaging" doctrine was found applicable for determining the "regular rate" of employees paid in conformity with a so-called "Poxon" or split-day plan. This plan provided that the first half of each tour of duty was to be paid for on a straight-time rate, and the second-half on an overtime rate. This Court concluded that under the plan, the workweek of employees was "shorn of all significance." It then held that the plan did not "allow extra compensation to be paid for true overtime hours."

We have no quarrel with the *Helmerich & Payne* decision. The facts in that case, however, must be distinguished from the facts in the cases now before the Court. The so-called Poxon plan was not the result of collective bargaining and did not purport to establish bona fide straight-time or overtime rates.

Under the most usual type collective agreement providing for overtime payments for work in excess of 8 hours daily and 40 hours weekly, it is frequently necessary for some or all employees to work a fixed number of overtime hours during many weeks of a year. When they so work, it

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[14] 316 U. S. 572 at p. 580, 86 L. ed. 1682, 62 S. Ct. 1216.

[15] *Idem* at page 578.

should not be concluded that they are engaged under conditions in anyway similar to those found to exist in the *Helmerich & Payne* case. Nevertheless, under the ruling of the Court below, employees engaged in conformity with such an agreement and normally working some overtime must be treated in the same manner as employees engaged under a split-day plan.

The averaging doctrine was also applied by this Court in the cases of *149 Madison Avenue Corp.* v. *Asselta* (1947), 329 U. S. 764, 91 L. ed. 1062 (adv. op.); *U. S.* v. *Rosenwasser* (1945), 323 U. S. 360, 89 L. ed. 301, 65 S. Ct. 295; *Walling* v. *Harnischfeger Corp.* (1945), 325 U. S. 427, 86 L. ed. 1, 65 S. Ct. 11; and *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U. S. 420, 89 L. ed. 1705. 65 S. Ct. 1242.

Again, the facts in each case are distinguishable from those in the instant cases, and from the facts frequently present when employees work under collective agreements fixing their wages, hours and working conditions.

In the *Asselta* case, the normal weekly hours of regular employees were established at 54 and 46 by the contract. Their weekly wages were said to include payments for regular hours and time and one-half for hours in excess of 40. Their hourly rate was to be derived from weekly wages by applying a specific formula.

This Court found that the formula was not followed and applied in determining the amount of wages due employees. Therefore, it concluded that the contract failed to conform with requirements of the statute.

In *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, *supra*, this Court was confronted with the problem of determining the "regular rate" of employees paid on a piece rate basis with minimum hourly guarantees. The problems involved in *U. S.* v. *Rosenwasser*, *supra*, were whether the Act applied to piecework employees and if so, how is the "regular rate" determined.

In each case, the *Missel* doctrine was applied. But neither case involved any question such as those now before the Court.

In *Walling v. Harnischfeger Corp., supra,* the only question directly before the Court was whether the "regular rate" of employees had to include incentive bonuses earned and paid for group efficiency. Clearly, this question did not relate to the question now before the Court and the decision on bonuses does not settle the overtime issue involved herein.

In summation, all of the decisions cited by the Court below to support its averaging doctrine must be distinguished from the cases now before this Court. Not one of the cited decisions compels the conclusion of the Court below.

The *last* proposition seemingly adopted by the Circuit Court is that any collective agreement would violate the Act if it purported to define regular and overtime rates for employees who normally and regularly work some overtime. Stated broadly, this conclusion means in reality that collective bargaining contracts are incapable of defining regular and overtime rates which will satisfy the requirements of the Fair Labor Standards Act.

This conclusion, we respectfully submit, disregards various decisions of this Court making it clear that as a matter of law employer and employee may fix a "regular rate" [and of course, an overtime rate] by contract. See *Walling v. A. H. Belo Corp., supra, Walling v. Halliburton Oil Well Cementing Co., supra.* See also *Walling v. Youngerman-Reynolds Harwood Corp., supra,* wherein this Court said:

> "As long as the minimum hourly rates established by Section 6 are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit. They may agree to pay compensation according to any time or work measurement they desire . . ."[16]

And *Walling v. Harnischfeger Corp., supra,* wherein it is stated:

> ". . . To discover that rate, as in the Youngerman-Reynolds case, we look not to the contract nomenclature

[16] 325 U. S. 419 at p. 424, 89 L. ed. 1705, 65 S. Ct. 1242.

but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek."[17]

CONGRESSIONAL INTENT SHOULD CONTROL.

In the past this and other courts have been faced with the need for reconciling two basic Federal statutes regulating employment relations: the National Labor Relations Act (49 Stat. 449, 29 U.S.C. Sec. 151 et seq.) and the Fair Labor Standards Act, *supra*. On occasion administrative and judicial interpretations of the F.L.S.A. have resulted in setting aside collectively bargained agreements fixing terms and conditions of employment more beneficial to employees than those required by the Act. See for example, *Jewell Ridge Coal Corp.* v. *Local No. 6167, U.M.W.*, (1945) 325 U. S. 161, 89 L. ed. 1534, 65 S. Ct. 1063; *Walling* v. *Harnishfeger Corp., supra; 149 Madison Ave. Corp.* v. *Asselta*, (1947), *supra; Walling* v. *Wall Wire Products Co.*, C.C.A. 6, (1947) 161 F. (2nd) 470.

Many of these decisions have been criticized even within this Court as unnecessarily restricting the proper area of collective bargaining and frustrating the policy of numerous Federal statutes; a policy, developed through a series of Acts dating at least as far back as 1926,[18] designed to encourage and even require the practice of collective bargaining.[19]

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[17] 325 U. S. 427 at p. 430, 89 L. ed. 1711, 65 S. Ct. 1246.

[18] Railway Labor Act (44 Stat. 577, 45 U. S. C. 151 *et seq.*); Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. 102 *et seq.*); National Industrial Recovery Act (Sec. 7(a) 48 Stat. 198), held unconstitutional in Schechter v. U. S. (1935), 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837.

[19] See dissenting opinion by Mr. Justice Jackson, the Chief Justice, Mr. Justice Roberts and Mr. Justice Frankfurter concurring, in *Jewell Ridge Coal Corp.* v. *Local No. 6167, U. M. W.* (1945), 325 U. S. 161, 172 wherein it was said:

> "We have repeatedly and consistently held that collectively bargained agreements must be honored, even to the extent that

It is respectfully submitted that today there can be no doubt as to the policy Congress intends to be paramount. By the enactment of the Portal-to-Portal Act of 1947 (Public Law No. 49, 80 Cong., 1st Sess.) and the Labor-Management Relations Act, 1947 (Public Law No. 101, 80 Cong., 1st Sess.) the Congress has made it abundantly clear that full faith and credit be extended to customs and practices embodied in collectively bargained agreements.

It is recognized that the instant cases were initiated before passage of the Portal-to-Portal Act and that that Act is not squarely in issue here at the present time. It is submitted, however, that the Court appropriately can and should take cognizance of the congressional policy enunciated in these statutes and, unless clearly inconsistent with the ends of justice, seek to effectuate the basic principles therein set forth.

As this Court said in *U. S.* v. *Hutcheson,* (1941), 312 U. S. 219, 235, 85 L. ed. 788, 61 S. Ct. 463, speaking through Mr. Justice Frankfurter:

> "On matters far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 391, 83 L. ed. 784, 789, 59 S. Ct. 516, and authorities there cited."

And in the same case quoting with approval the language of Mr. Justice Holmes, on circuit, in *Johnson* v. *United States* (C.C.A. 1st) 163 F. 30, 32, 18 L.R.A. (N.S.) 1194:

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employers may not, while they exist, negotiate with an individual employee or a minority, cf. J. I. Case Co. v. National Labor Relations Bd., 321 U. S. 332, 88 L. ed. 762, 64 S. Ct. 576, and must pay heavy penalties for violating them. Cf. Order of R. Telegraphers v. Railway Exp. Agency, 321 U. S. 342, 88 L. ed. 788, 64 S. Ct. 582. And now at the first demand of employees the Court throws these agreements overboard, even intimating that to observe agreements, bargained long before enactment of the Fair Labor Standards Act would be 'legalizing' a frustration of the statutory scheme."

"A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. *The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.*" (Emphasis supplied).

The Congress in enacting the Labor-Management Relations Act, 1947, restated in identical terms the policy of the United States as expressed in the N.L.R.A. (Sec. 1) of seeking to eliminate obstructions to interstate commerce ". . . by encouraging the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of their [employees] employment . . .".

Section 1 of the Portal-to-Portal Act sets forth clearly and in detail the basic reasons underlying enactment of this statute. Therein the Congress has made a finding "that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees . . . " thus, creating large, unexpected liabilities retroactive in operation against employers with the result that if permitted to stand, claims arising under such interpretations would bring about "financial ruin of many employers" and impair the capital resources of many others.

The Congress further found that under then existing conditions "the credit of many employers would be seriously impaired"; that employees would receive "windfall" payments, including liquidated damages for activities performed without any expectation of reward beyond agreed upon "regular rates" of pay; that demands for such windfall payments would be stimulated and that "voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created."

The Congress recognized that such claims would create a serious burden on the Courts of the country and that "champertous practices would be encouraged." In addition the serious effect on our public finances through loss of tax revenues and increased costs of goods purchased were viewed as contributing to the need for this legislation.

It was therefore declared to be the policy of the Congress (Sec. 1(b)) in enacting this law to meet the existing emergency and "to correct existing evils", "(1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts."[20]

Here then, is a congressional policy declared in unmistakable terms. Clearly the public policy expressed in the Portal-to-Portal Act was intended to apply to all cases arising under the Fair Labor Standards Act and not just to the so-called "portal type" cases.

It is not suggested that collective agreements can be permitted to do open violence to the policies of the F.L.S.A. This Court has, however, in at least two cases recognized, that the Act should not lightly override even individual employment contract arrangements where the minimum standards in the Act have been faithfully observed. *Walling v. Belo Corp., supra,* and *Walling v. Halliburton Oil Well Cementing Co., supra.* Certainly collectively bargained contracts are entitled to at least the same dignity and respect.

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[20] The Portal Act seeks to ban all past so-called "portal" claims for minimum wages or overtime or liquidated damages not based on custom or practice. Much the same emphasis is placed upon "contract, custom or practice" with respect to future so-called "portal" claims. In addition a defense is provided against "portal" type claims as well as all other claims for retroactive wage payments where it can be shown that a "good faith" effort was made to comply with the law as interpreted.

Further evidence of the Congress' intent to eliminate insofar as possible unjustified claims for back wages and liquidated damages is demonstrated in the 2-year statute of limitations provision on all such claims and granting the courts some discretion in fixing the amount of liquidated damages which may be recovered.

The Record in these cases is abundantly clear and undisputed that the terms and conditions of employment were arrived at through good faith collective bargaining between the employers and representatives of their employees. (See testimony of Joseph B. Ryan, President, International Longshoreman's Association (R. 232 et seq.). The rates of pay and hours of work were all well within the standards prescribed by the F.L.S.A. and in fact far more liberal than such minimum requirements.

Based upon voluminous testimony and exhaustive findings of fact, United States District Judge Rifkind in his opinion below (69 F. Supp. 956) had this to say:

> "The agreement here under scrutiny was not an artificial rearrangement of pre-F.L.S.A. rates of compensation in order to avoid additional compensation payable under that Act. It is not an attempt 'to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes' (citing cases).
>
> "On the contrary it is the product of long history, collective bargaining, and an honest effort, however imperfectly achieved, to deal with the necessities of a unique situation."

Even assuming the correctness of earlier decisions of this Court, the Congress has now, with knowledge of those decisions, declared that henceforth greater freedom and protection be accorded established customs, practices and contracts in the administration and enforcement of the Fair Labor Standards Act.

CONCLUSIONS.

1. Neither the Fair Labor Standards Act nor the Decisions of this Court Warrant Affirmance of the Decision in this Case Filed by the Court Below.

2. The Congressional Policy as Expressed in the Labor-Management Relations Act, 1947 and the Portal-to-Portal Act of 1947 Affords Ample Justification for Reversal of the Decision Below and in Our Judgment Compels such a Result.

Respectfully submitted,

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